FILE COPY

Office-Supreme Court, U.S.
FILED
JUL 2 1959
E. K. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. [redacted] 99

NACIREMA OPERATING COMPANY, INC.,
Petitioner,

vs.

CALMAR STEAMSHIP CORPORATION,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

GEORGE W. P. WHIP,
ROBERT E. COUGHLAN, JR.,
823 Munsey Building,
Baltimore 2, Maryland,
Attorneys for Respondent.

The Daily Record Co., Baltimore 3, Md.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 983

NACIREMA OPERATING COMPANY, INC.,
Petitioner,

vs.

CALMAR STEAMSHIP CORPORATION,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the United States District Court for the District of Maryland is reported in 164 F. Supp. 628. It is printed beginning on page 80 of the record known as the Joint Appendix.[1] The opinion of the Court of Appeals for the Fourth Circuit is not yet reported.

[1] Hereinafter referred to as "A".

JURISDICTION

Judgment of the Court of Appeals was entered on April 8, 1959. The Petition for a Writ of Certiorari was filed on June 8, 1959. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

QUESTION PRESENTED

When a longshoreman uses an appliance which the shipowner agreed to furnish and furnished and the longshoreman before using it knew it to be defective but negligently went ahead and used it anyway and used it in an improper and negligent manner all of which the Court found to be a breach of the contracting stevedore's contract to do its work in a safe and workmanlike manner which breach caused or contributed to an injury to another longshoreman, does the shipowner who was found liable to the injured longshoreman because of unseaworthiness and negligence forfeit his right to indemnity against the stevedoring company?

STATEMENT OF THE CASE

Pursuant to a contract entered into between Calmar Steamship Corporation, owner and operator of the SS PORTMAR, and Nacirema Operating Company, Inc., a stevedoring company, whereby Nacirema agreed and undertook to load the SS PORTMAR, on December 6, 1955, at Sparrows Point, Maryland, loading operations were in progress (Third Party Complaint A. 1: Answer to Third Party Complaint A. 2; Court's Exhibit No. 1 A. 76; Robak A. 8; Rutkowski A. 16; Moulton A. 38). About 4:45 p.m. on said day while one of Nacirema's employees who was stationed on the deck of the PORTMAR at No. 4 hatch was attempting to pass one of the ship's cargo lights to men working in

No. 4 lower hold, the electric cable which was made fast in the top of the light parted and the light fell and struck the Plaintiff, one of Nacirema's employees, on the head causing him injuries (Robak A. 9-13; Gryzbowski A. 15-16; Rutkowski A. 16-28). Plaintiff, the injured man, filed suit against Calmar Steamship Corporation wherein Calmar filed a Third Party Complaint against Nacirema.

The light which the stevedore selected to pass to the men working in No. 4 lower hold was a new one and one of several which were placed on the deck of the vessel for use of the stevedores. It weighed about 8½ pounds and the electric cord was made fast in the top of the light (Opinion A. 81-82; Moulton A. 38-41; Rutkowski A. 17-18, 27). At the trial the stevedore who handled the light claimed that it was the only one in the vicinity of No. 4 hatch which had a good bulb (Rutkowski A. 18). He claimed further that while the light appeared to be a new one the customary handle at the top with which to carry it was missing (Rutkowski A. 20). He said that it had no lanyard, described as a small rope attached to the handle of the light with which to hand it on a beam or other place in the hatch and he testified that the electric cord was not seized or tied to the handle in order to take the weight of the light off the cord (Rutkowski A. 18-20; Opinion A. 80-82). And this stevedore admitted that he made no complaint to any of the officers on the ship in respect to the condition of the light or that it was the only light in the vicinity of No. 4 hatch which was equipped with a serviceable bulb (Rutkowski A. 26).

Mr. Moulton, Chief Mate of the SS PORTMAR, testified at the trial that the light was a new one which he had put on the deck on the morning of December 6, 1955, and that while it had no lanyard on it and was not seized, he had

instructed the Boatswain to equip it with a lanyard (Moulton A. 39, 41, 50). He testified further that the light had a handle, that new lights are often used without being seized and that contrary to testimony given by Plaintiff's witnesses the practice is safe if the lights are handled properly (Moulton A. 41, 45, 48-50; Harper A. 29-30; O'Callaghan A. 32-34, 36). Both Mr. Moulton and Mr. White, Second Mate on the PORTMAR, testified that the stevedore who handled the light, handled it improperly. They said that the stevedore grasped it with the electric cord and swung it over the hatch coaming bringing the light up on the cord with a jerk which caused the cord to part from the light and the light to fall into the hold (Moulton A. 43, 46-48; White A. 53-54, 56-58).

The verdict of the Jury consisted of answers to eleven questions submitted to it by the Court. The questions and answers will be found beginning on page 71 of the Joint Appendix. Questions 1, 2, 3, 4, 9, 10 and 11 with their respective answers are herewith set forth:

"1. Under all the facts of this case, was the SS PORTMAR, at the time and place of the injury complained of, unseaworthy in respect to the cargo light?

Yes X No

2. If you find such unseaworthiness, was such unseaworthiness a proximate cause of the injuries sustained by the Plaintiff?

Yes X No

3. Under all the facts of this case, was the Calmar Steamship Corporation, or any member of the crew of the SS PORTMAR, negligent in respect to the cargo light?

Yes X No

4. If you find such negligence, was such negligence a proximate cause of the injury sustained by the plaintiff?

Yes X No

9. Was the cargo light lowered in a negligent manner?

Yes X No

10. If the answer to question 9 is 'Yes', (a) was the manner in which the cargo light was lowered the sole proximate cause of the accident, or (b) was the manner in which the cargo light was lowered a proximate cause of the accident?

(a) Yes No X

(b) Yes X No

11. Were the stevedores negligent in using a cargo light that was not seized?

Yes X No"

The District Court held that Nacirema breached its contract with Calmar to do its work in a careful and workmanlike manner and that the breach by Nacirema caused or contributed to Plaintiff's injuries (Opinion A. 88-89). But the Court held further that because the appliance was furnished by Calmar pursuant to its contract with Nacirema, Calmar forfeited its right to indemnity from Nacirema.

ARGUMENT

I.

THE OPINION OF THE COURT OF APPEALS CONFORMS TO THE OPINIONS OF THIS COURT.

In *Ryan Stevedoring Company, Inc. v. Pan Atlantic Steamship Corporation*, 350 U.S. 124, 100 L. Ed. 133, 76 S. Ct. 232, decided on January 9, 1956, this Court held that the ship involved was made unseaworthy because of improper stowage and that because the ship was unseaworthy, Plaintiff, a stevedore, should recover against the ship-

owner. It was held further that the contract between the shipowner and *Ryan* the stevedoring company implied that *Ryan* would do its work in a safe and workmanlike manner and that as the ship had been made unseaworthy by the fault on the part of the stevedoring company in the matter of stowing cargo, the fault on the part of the shipowner to discover and correct the defect in the stowage should not prevent the shipowner from recovering indemnity from the contracting stevedore for its breach of contract to stow safely.

In *Weyerhaeuser Steamship Company v. Nacirema Operating Company, Inc.*, 355 U.S. 563, 2 L. Ed. (2d) 491, 78 S. Ct. 438, decided on March 3, 1958, this Court extended the doctrine of the *Ryan* case by applying it to the negligent use of ship's appliances by stevedores and to negligence on the part of the shipowner as well as unseaworthiness. Furthermore, in that case on page 569, this Court said:

> "that in the area of contractual indemnity an application of the theories of 'active' or 'passive' as well as 'primary' or 'secondary' negligence is inappropriate".

And in *Crumady v. J. H. Fisser*, 358 U.S. 423, decided by this Court on February 24, 1959, after citing with approval the *Ryan* and the *Weyerhaeuser* decisions this Court said:

> "We conclude that since the negligence of the stevedores which brought the unseaworthiness of the vessel into play, amounted to a breach of the warranty of workmanlike service, the vessel may recover over."

Clearly, therefore, Judge Sobeloff, speaking for the Court of Appeals for the Fourth Circuit was right when he said:

> "In determining whether the actions of Calmar were such as to bar recovery, we must necessarily compare them to those of the owner in *Crumady*. Here, the ship

did not inspect the light and did not provide seizing. In *Crumady* the ship's crew supplied a cut-off device which they had set at twice the rated limit of the rigging. Certainly supplying the defective cut-off device was no less a contractual violation there than the supplying of the unseized cargo light here. If the former did not preclude recovery, then, under the principle announced in *Crumady*, we think the latter should not."

II.

LOWER COURTS HAVE HELD THAT STEVEDORES WHO KNOWINGLY USE DEFECTIVE APPLIANCES BREACH THEIR CONTRACTS TO PERFORM THEIR WORK IN A SAFE AND WORKMANLIKE MANNER WHICH ENTITLES SHIPOWNERS TO INDEMNITY.

American President Lines Ltd. v. Marine Terminals Corp., 234 F. (2d) 753 (C.C.A. 9);

Pierce v. Erie Railroad Company, et al., 165 F. Supp. 216 (S.D.N.Y.);

Shannon v. United States, 235 F. (2d) 457 (C.C.A. 2);

Ignatyuk v. Tramp Chartering Corp., 250 F. (2d) 198 (C.C.A. 2);

Thomas Berti v. Compagnie de Navigation Cyprien Fabre, 213 F. (2d) 397 (C.C.A. 2).

CONCLUSION

For the foregoing reasons it is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

GEORGE W. P. WHIP,

ROBERT E. COUGHLAN, JR.,

Attorneys for Respondent.